

IN THE MATTER of the Gambling Act 2003
AND on an appeal by **AIR RESCUE SERVICES LIMITED**

BEFORE THE GAMBLING COMMISSION

Members: G L Reeves (Chief Gambling Commissioner)
L M Hansen
D C Matahaere-Atariki

Date of Decision: 8 May 2015

Date of Notification of Decision: 14th May 2015

DECISION ON AN APPEAL BY AIR RESCUE SERVICES LIMITED

Introduction

1. The appellant, Air Rescue Services Limited ("Air Rescue" or "Appellant") appealed to the Commission against a decision by the Secretary refusing to grant it a new class 4 venue licence for Robbies Sports Bar & Bistro, Belfast ("Robbies") under the Gambling Act 2003 ("Act").

Decision under appeal

2. The Secretary refused to provide the licence on the basis that he was not satisfied that the criteria in subsections 67(1)(c), (d) and (r) of the Act were met. Those criteria relate to the Secretary's satisfaction as to the suitability of key persons and that there are no other factors likely to detract from achieving the purposes of the Act.
3. The Secretary was not satisfied that that Wayne Nutbrown, the venue manager and sole shareholder and director of the venue operator company, WON Investments, was a suitable key person (sections 67(1)(c) and (d)), in light of evidence indicating that:
 - (a) Mr Nutbrown was involved in decisions about the application or distribution of the net proceeds of class 4 gambling, in breach of section 113 of the Act; and
 - (b) Mr Nutbrown had agreed to move Robbies to Bluegrass Holding Limited ("BHL"), a society being investigated by the Department, on the understanding that, if BHL's operator's licence were cancelled, he would be paid the equivalent of the site rental in cash, in breach of section 118 of the Act.



4. The Secretary also considered that the influence of Mike O'Brien and Ray McIntyre in the distribution of the net proceeds generated by Robbies and in decisions about the movement of Robbies between class 4 operators were other factors likely to detract from achieving the purposes of the Act (section 67(1)(r)).
5. In reaching his conclusion, the Secretary relied on the following contemporaneous emails and other documents authored by Mr O'Brien, Mr McIntyre and Peter Gurr (the then chairman of BHL):
- (a) Handwritten notes (and a typed version of the same), authored by Mr Gurr in about November 2012, attaching a spreadsheet of grant allocations. The key passages of the note are as follows:

Following our last meeting Don brought up some questions about how various Harness Racing (or Racing Clubs) grants were received and calculated.

...

Before you/we go there you need to understand the importance of our relationships with the venue operators and the need to keep them and their clients satisfied. Basically no venues/no Bluegrass.

Examples of customer grants:

...

So for our trust to survive it is important to maintain venues. This can only be achieved by looking at Patrons applications favourably.

i.e. ...

Belfast Rugby at Robbies

...

There is only a slim chance of retaining Robbies but none if we fail to support their requests. But as I have spoken about before 50/50 is more than acceptable to us.

...

This year's budget is supplied. It calculates average bankings and works out possible donations. It takes into account patrons needs and budgets for directors personal pet projects \$240K per annum.

- (b) An email exchange dated 18 June 2012 from Ray McIntyre to Mike O'Brien with the subject line "Robbies Belfast", although appearing to discuss an unrelated grant application sent by Mr McIntyre to Mr O'Brien. Mr O'Brien wrote:

Could you please not send mail to Bluegrass/Roebyna with my name on it? She gets angry! Lol

To which Mr McIntyre replied:

It would only have been a little post-it note with a "please look after...". Do you want me to send applications to you at home, or to Roe and then let you know its coming?

Mr O'Brien responded:

Send direct to Roebyna without my name on it...and fax note to me on 035769725 so I can make sure its looked after.

- (c) An email exchange in July 2012 between Mr McIntyre and Mr O'Brien which occurred after Robbies had executed a venue agreement on 1 June 2012 and before the venue licence application was filed on 12 August 2012. On 18 July 2012, Mr McIntyre wrote:

Just thought I'd let you know the rumour that's out there – Robbies Belfast owner had obviously heard about the cancellation – he said he had every tom dick and herry from other trusts ringing him up or going to see him. Vultures! Anyway, he said to me that the rumour out there, from a very reliable source he claimed, was that Bluegrass was paying up to \$60K to get a venue. Scaremongering and shit-stirring from other trusts?

Am doing my best to convince him to follow-thru with joining Bluegrass, but he wants some assurances as understandably he's very nervous about what could happen if the licence was actually cancelled i.e. his loss of \$3k a week for 6 weeks while he gets into another trust, and loss of trade.

What can I tell him – will someone somehow be able to cover this for him in the event of the worst happening? Is there any level of comfort I can give him? Roe is wanting to get this stuff filed with DIA, and this cancellation thing just put the brakes on with getting the paperwork I need out of him. Sigh, not what either of us needed.

Mr O'Brien replied on 19 July 2012:

Bluegrass Trust is paying no such amounts

Please give him your word, and I give you mine, that if he is ever down, which I doubt, that his missing site rental will be paid....tax free!

- (d) Email correspondence from Ray McIntyre to Mike O'Brien dated 12 November 2012:

But as far as donations \$\$ to date go, this was a little concerning so my quick calculations had Bar 331 banking approx. \$750k since Bluegrass has had it, and Robbies Belfast \$240k + \$990k. Excl GST + \$880k x 40% donations + \$344k. From what I can see/recall, donations via my suggestion have been approx 90k?? (you may correct me on this as I haven't exactly kept a record, so would be interested to know if I've forgotten anything), leaving Bluegrass with \$254k for racing over the last year, which is more than 70%. I was thinking this is a very good result for racing and more than sufficient benefit for taking these venues on for the short-term for me as a favour.

Just reiterating that sideline bar/331 was agreed as just a 'hold' for me until a Licence came through – hence the venue agreement for 1 year. I'd love to have left it with you longer, but I had no idea how long a licence might take. Belfast was only going to be 1 year max as well – pending the Licence, although a 3 year term was signed just for your bank finance purposes.

So I'll give you plenty of warning for Belfast too when it's needed to come across. As you know, Belfast is very nervous over the

Bluegrass cancellation and it took a lot of effort – and promises from you for site rent in cash (no tax! LOL) if they lose it – to get them across to you. I don't know when just yet – but I don't want to make any promises over when it will depart, as I'm not the decision maker here. In the meantime, you can of course do whatever with the donations apart from what's requested here and there.

6. The Secretary also relied on some of Mr Nutbrown's answers in an interview by a Department of Internal Affairs ("Department") Senior Gambling Inspector.
7. Air Rescue appealed to the Commission. After the parties had filed affidavit evidence and submissions, including submissions in reply, the Commission decided that it would benefit from an oral examination of Mr Nutbrown. The oral examination took place on 10 April 2015. Following the examination, the Appellant made submissions orally and the Respondent filed further written submissions at a later date.

Relevant law

8. The relevant provisions of the Act are as follows:

4 Interpretation

key person means,—

In relation to a class 4 venue licence,—

- (i) a venue manager;
- (ii) venue personnel;
- (iii) a venue operator;
- (iv) a person who is a director, chief executive, or senior manager of a venue operator;
- ...
- (v) a person contracted to service gambling equipment at a class 4 venue;

66 Secretary must investigate applicant for class 4 venue licence

- (1) The Secretary must undertake any investigations the Secretary considers necessary to determine—
 - (a) whether the applicant is eligible and suitable to be granted a class 4 venue licence; and
 - (b) whether the venue manager and venue operator are suitable persons in terms of section 68.
- (2) The Secretary may undertake whatever investigations the Secretary considers necessary to determine whether any other key person is a suitable person in terms of section 68.

67 Grounds for granting class 4 venue licence

- (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that—

...

- (c) the venue manager is an individual and any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about his or her suitability, in terms of section 66, to supervise—
- (i) the conduct of class 4 gambling at the venue; and
 - (ii) venue personnel; and
- (d) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of any other key person, in terms of section 68; and
- ...
- (r) there are no other factors that are likely to detract from achieving the purpose of this Act; and

68 Determining suitability for class 4 venue licence

- (1) In determining whether a key person is a suitable person for the purpose of sections 66 and 67, the Secretary may investigate and take into account the following things:

...

- (c) the profile of past compliance by the key person with—
- (i) this Act, minimum standards, game rules, Gazette notices, and licence conditions; and
- ...
- (ii) previous gaming Acts, and regulations made under previous gaming Acts; and
 - (iv) a licence or a site approval issued under a previous gaming Act.

113 Key persons must not be involved in certain activities or decisions

- (1) A key person in relation to a venue to which section 65(3) applies must not—
- (a) provide application forms for persons or groups in the community to complete in order to apply for grants of net proceeds from class 4 gambling; or
 - (b) be involved in decisions about, or in managing, the application or distribution of net proceeds from class 4 gambling conducted by a corporate society that operates at the venue (whether or not the net proceeds derive from that venue); or
 - (c) provide, or be involved in decisions about who will provide, to the corporate society that conducts class 4 gambling at the venue, goods or services other than services listed in the class 4 venue agreement; or
 - (d) provide, or be involved in decisions about who will provide, goods or services to recipients of grants of net proceeds from

class 4 gambling conducted by a corporate society at the venue if the goods or services constitute at least part of the authorised purpose for which net proceeds were granted; or

- (e) be involved in decisions about who will provide goods or services to recipients of grants of net proceeds from class 4 gambling conducted by a corporate society that operates at the venue (whether or not the net proceeds derive from that venue) if the goods or services constitute at least part of the authorised purpose for which net proceeds were granted.
- (2) A key person in relation to a venue who contravenes this section commits an offence and is liable on conviction to a fine not exceeding \$10,000.
 - (3) A key person in relation to an operator's licence or the holder of a class 4 operator's licence who knowingly allows a key person in relation to a venue to contravene this section commits an offence and is liable on conviction to a fine not exceeding \$10,000.
- 118 Certain persons must not seek, receive, or offer benefits with conditions attached**
- ...
- (2) A key person in relation to a class 4 venue licence must not knowingly receive or seek money, a benefit, an advantage, privilege, or gift from the following persons, if the receipt has a condition attached to it and whether the receipt or condition is direct, indirect, formal, informal, or otherwise:
 - (a) a holder of a class 4 operator's licence if the holder operates at that venue;
 - (b) a key person in relation to a class 4 operator's licence if the holder operates at that venue.
 - (3) A holder of, or key person in relation to, a class 4 operator's licence, or person that sells, repairs, services or maintains gambling equipment must not knowingly offer money, a benefit, an advantage, a privilege, or a gift to the following persons if the receipt has a condition attached to it and whether the receipt or condition is direct, indirect, formal, informal, or otherwise:
 - (a) a grant recipient or potential grant recipient;
 - (b) a key person in relation to a class 4 venue licence.
 - (4) Subsections (2) and (3) do not prevent the holder of a class 4 operator's licence paying a key person in relation to a class 4 venue costs associated with the class 4 venue if the costs-
 - (a) do not exceed the amounts specified in any venue agreement; and
 - (b) do not exceed the limits in section 116; and
 - (c) are otherwise lawful.
- ...
- (6) To avoid doubt, this section applies whether-
 - (a) the condition is attached either before or after the money is received by the person concerned; or
 - (b) any money is actually received by the person concerned.

Evidence and submissions by the Appellant

9. Mr Nutbrown filed two affidavits in the appeal, denying the Secretary's allegations. He deposed, in summary, as follows:
- (a) Mr Nutbrown has never been personally concerned about which gaming trust Robbies is aligned to, because he thinks that they all fairly similar in what they offer to a venue. On the advice of Mr McIntyre and Paul Kofoed, the owner of the Robbies franchise, Robbies had previously moved around between several societies associated with Mr McIntyre. However Mr McIntyre had nothing to do with the decision to move Robbies to Air Rescue.
 - (b) Mr Nutbrown never discussed with Mr McIntyre the allocation of grants and never suggested that Robbies required or expected any aligned society to allocate grants to particular recipients.
 - (c) While Mr Nutbrown is a life member of Belfast Rugby Club and a social member of Belfast Bowling Club, he was not involved in the grant applications by either of those clubs. However, in his view, it would not be unusual for local groups to apply for grants from the trust that operates at Robbies.
 - (d) He did not seek any arrangement from BHL for lost site rental to be paid, never received any offer to do so and never received any such payment. He had no knowledge of the communications between Mr McIntyre and Mr O'Brien and denies that either of them have any influence over him.
 - (e) Mr Nutbrown does not consider that his answers in the interview with the Department's Senior Gambling Inspector were contradictory. Mr Nutbrown was relaxed about the interview because he did not think that he had anything to worry about. He had heard many rumours going around about trusts being investigated by the Department, including BHL, but did not take the rumours seriously. He asked Mr McIntyre about the rumours and was told that BHL was still operating.

Suitability test

10. In relation to the approach by the Secretary, and Commission on appeal, to the suitability assessment, the Appellant submitted that the correct test is whether, on a proper evidential basis, there have been any established instances of past non-compliance, whether such non-compliances raise valid concerns about future compliance and, if so, whether these concerns are being addressed.
11. The Appellant submitted that the Secretary's allegations are not sustainable and, based on the correct test, cannot have any impact on Mr Nutbrown's profile of past compliance, for the following reasons:

- (a) There is no evidence of any link between Mr Nutbrown and the emails between Mr McIntyre and Mr O'Brien. Nor is there any evidence of a link between Mr Nutbrown and Mr Gurr. Mr Nutbrown denied the allegations in his interview with the Department Gambling Inspector, denied any wrongdoing in his affidavit filed with the appeal and confirmed that he was happy to be cross-examined on his evidence.
- (b) There is no evidence that Mr Nutbrown was involved in decisions about grants. The wording of Mr Gurr's note discussing grant allocations can be explained without reference to requests from Robbies. The pattern of grants made by societies operating at Robbies to particular community groups is not unusual, as it reflects a policy of making distributions to local applicants. An affidavit of Barry John Steans, managing director of Air Rescue, attached evidence demonstrating that a number of societies mandate this approach as part of the grants approval process.
- (c) The Secretary's allegation in respect of section 118 cannot be made out on the Secretary's evidence because Mr McIntyre has never been a key person of BHL. Moreover, Robbies was already legally committed to BHL before BHL's licence was cancelled and prior to the emails between Mr McIntyre and Mr O'Brien referring to the cash site rental payment.
- (d) In any event, any concerns about Mr Nutbrown's profile of past compliance are addressed by Air Rescue's own procedures. Air Rescue is a highly compliant society. Involvement of Mr McIntyre and Mr O'Brien in BHL's processes is irrelevant in relation to the Appellant's application for a licence.

Alternative suitability test

- 12. The Appellant also invited the Commission to apply an alternative approach to the suitability assessment, based on a higher threshold; namely that, before an allegation of breach can be taken into account in assessing a person's profile of past compliance, the Commission must make a positive factual finding that the breach actually occurred, on the balance of probabilities but taking into account the seriousness of the potential consequences. Notwithstanding that the provisions are licensing provisions, not penal ones, the Appellant submitted that, because the decision to grant the licence or not has the potential to have a significant effect on an individual's livelihood, a principled and rigorous approach to making that decision must be taken.
- 13. The Appellant submitted that the disclosure material provided in the Secretary's bundle indicates that, although the Department did not consider that it had sufficient evidence to prosecute Robbies or the venue operator for breaches of the Act, it ultimately determined that it was appropriate to make a decision to refuse to grant the licence. The Department's



decision to refuse the licence, in light of the significant effects to Mr Nutbrown, potentially conflicted with the fundamental right to natural justice, including under section 27 of the New Zealand Bill of Rights Act 1990. The Appellant argued that a higher threshold was supported by the Supreme Court decision in *Z v Dental Complaints Assessment Committee*.¹

14. Applying the higher threshold to the present appeal, the Appellant submitted that there is insufficient evidence to be able to conclude that Mr Nutbrown actually breached the sections as alleged and, accordingly, there is no breach or non-compliance that could have any effect on Mr Nutbrown's previous profile of past compliance.

Other factors

15. In relation to the test under section 67(1)(r), the Appellant submitted that the Commission must identify whether there is any particular factor of concern, identify how that factor might detract from a particular purpose of the Act, and then determine whether it is likely that the factor will detract from the purpose of the Act in the future if a licence is granted. Applying this test to the Secretary's evidence, the Appellant submitted, in summary, as follows:
- (a) The alleged involvement of Mr O'Brien and Mr McIntyre in other societies' grants processes has nothing to do with Air Rescue or Mr Nutbrown, and accordingly is irrelevant to the application of the grant of the licence to Air Rescue.
 - (b) There is no evidence that either Mr McIntyre or Mr O'Brien were involved in any way with Mr Nutbrown's decision to enter into a venue agreement with Air Rescue and, even if they had been, Air Rescue is a compliant society.
16. The Appellant concluded by submitting that, given the significant losses to Robbies and Mr Nutbrown personally arising from the cancellation of BHL's licence and the Secretary's investigation, even if Mr Nutbrown had behaved improperly, the Commission should find that he would be very reluctant to do so again.

Submissions by the Secretary

17. The Secretary submitted, in summary, as follows:
- (a) The appropriate approach to the suitability assessment is that set out by Commission in *Phoenix* (decision GC04/14). There is no presumptive right to a licence, rather a licence cannot be granted unless the Secretary is satisfied of the suitability of all key persons. The Appellant's alternative approach to the suitability assessment is an unnecessary overlay on the wording of the Act. The Commission confirmed in *Phoenix* that conclusive evidence of an actual breach of the Act is not necessary in order to be not satisfied of the suitability of a key person, nor is it necessary for the Commission to make firm findings of fact in

¹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

relation to a disputed event. The Supreme Court's comments in Z regarding the standard of proof to be applied by a disciplinary body are of little relevance to the present appeal, because the disciplinary action taken by the Dental Complaints Assessment Committee was partly punitive in nature and the legislative scheme in that case required the Committee to be satisfied that the practitioner was guilty of professional misconduct, a very different test to that which the Commission must apply.

- (b) The evidence strongly suggests that Mr Nutbrown was involved in the distribution of net proceeds by BHL. Mr Nutbrown's interview with the Department suggests that Mr Nutbrown understood that the funds generated by Robbies did not go to racing clubs, the principal beneficiaries of BHL grants. Mr Gurr's note indicates that net proceeds generated by particular venues were ear-marked for causes in which the venue operator has an interest. The pattern of grants to causes linked to Mr Nutbrown is relevant and the implication from the pattern is that the grants were made under pressure from the venue.
- (c) The email chains of 18 July 2012 and 12 November 2012 strongly indicate that Mr Nutbrown has been involved in behaviour prohibited by section 118 of the Act. No explanation has been offered as to why Mr McIntyre, in a private email intended only for Mr O'Brien, would fabricate a story in order to seek assurances from Mr O'Brien. Nor is there any plausible explanation as to why he would return to the matter in his later email and remind Mr O'Brien of the effort and promises that he required to convince Mr Nutbrown to move his venue to BHL, if that had not in fact been the case.
- (d) Mr Nutbrown's answers during his interview regarding the decision to move to BHL, and his knowledge of the possible cancellation of BHL's licence, were contradictory.
- (e) It is not significant that Mr Nutbrown had signed a venue agreement prior to the cancellation of BHL's licence. Regardless of when the venue agreement was signed, the licence application itself was not submitted until after the emails in question and over a month after the Secretary had cancelled BHL's operator's licence.
- (f) The apparent influence of Mr McIntyre over Mr Nutbrown, particularly in relation to the decision as to which society should operate gaming machines at his venue, is a factor likely to detract from achieving the purposes of the Act; namely the purpose of limiting the opportunities for crime or dishonesty associated with gambling. Further, in light of the concerns as to Mr Nutbrown's profile of past compliance with the Act, allowing a person who has acted in a way contrary to both sections 113 and 118 to continue to participate in the sector is a factor likely to detract from



achieving the purposes of the Act; namely the purpose of limiting opportunities for crime and dishonesty.

- (g) Although the nature of a decision whether to grant a licence under section 67(1) is inherently forward-looking, the assessment as to a person's suitability is primarily a present assessment of satisfaction, informed by past events. In drawing a line between Mr Nutbrown's conduct with BHL and his potential conduct with Air Rescue, the Appellant mischaracterises the requirements of section 67(1)(c) and (d). The question is not whether the key person will be able to breach the Act if the licence is granted, the question is whether the Secretary, or the Commission, is satisfied as to that key person's suitability.

The Appellant's submissions in reply

18. In reply, the Appellant submitted as follows:

- (a) The Secretary's approach would require the Commission to be satisfied beyond reasonable doubt that there are no issues of past non-compliance, but that approach has never been an appropriate standard to apply in this sort of forum. Instead, all that is required is that the Commission is able to make up its mind on the balance of probabilities that a particular key person is not unsuitable, in the sense of it being more likely than not that they will comply with the Act in the future. There is no policy or other reason why the Secretary should not have to meet the usual civil standard in assessing a breach of the Act. Nor is the Secretary's approach required by the wording of section 67.
- (b) The grants made to Belfast Rugby can be explained by reasons other than Mr Nutbrown's involvement in grant allocation decisions.
- (c) Mr Nutbrown's interview answers were not inconsistent. He was not fully aware of and did not appreciate the potential implications of the cancellation at the time that the venue agreement was entered into.
- (d) It is impossible for either the Appellant or Mr Nutbrown to comment on what Mr McIntyre may have been thinking when he sent the email of 12 November 2012, but in both emails Mr McIntyre was seeking further work from BHL and may well have had some reason to exaggerate or accentuate his apparent value in respect of Robbles.
- (e) The Appellant does not agree with the Secretary's suggestion that the potential remedial matters raised by the Appellant are not relevant in this context. The Appellant submits that it is highly relevant that there is no prospect of any of the sorts of issues raised by the Secretary in relation to Robbles occurring while it is licensed to the Air Rescue.

Oral hearing

19. In addition to the substantive submissions and affidavit evidence summarised above, Mr Nutbrown was examined before the Commission on 10 April 2015. The Commission's impressions of Mr Nutbrown are addressed in the analysis section which follows.
20. The Appellant made oral submissions at the hearing, following the examination of Mr Nutbrown. The Appellant submitted, in summary, the following points:
- (a) None of the authors of the documents relied on by the Secretary have been subject to cross-examination. There is danger that admitting such documents would lead to inaccuracy as to the meaning of the documents, inability to evaluate the sincerity of the document and its author, and the potential for ambiguity. Moreover, the relevant issues cannot be tested.
 - (b) Mr McIntyre had a significant motive to mislead Mr O'Brien as to his influence over venue operators. The emails produced by the Secretary indicate that Mr McIntyre was in need of money and a job and that he was attempting to prove his importance and his necessity to Mr O'Brien. Therefore, he had a motive to embellish his ability to ensure that venue operators remained loyal to BHL.
 - (c) Mr Nutbrown's evidence at the oral hearing is positive, direct evidence that Mr Nutbrown is a satisfactory venue operator and manager. The onus falls on the Secretary to put forward evidence in support of his allegation that the Commission cannot be satisfied as to Mr Nutbrown's suitability. In the Appellant's submission, the Secretary cannot rely on the emails and other documents to support his allegation, given the dangers in relation to reliability noted above in 19(a). Accordingly, the Commission should be satisfied about Mr Nutbrown's suitability.
21. The Secretary filed further written submissions. The Secretary submitted, in summary, that the Commission should confirm the decision of the Secretary to refuse the class 4 venue licence to the Appellant, for the following reasons:
- (a) The Appellant has approached the appeal from the incorrect starting point that the onus is on the Secretary to prove that a particular breach of the Act occurred. The proper approach instead puts the onus on the Appellant to satisfy the Secretary that all of the criteria in section 67(1) of the Act are met. If the information available to the Secretary, or Commission on appeal, raises concerns as to the suitability of Mr Nutbrown, these concerns need to be addressed by the Appellant in order to provide the required satisfaction.
 - (b) The Appellant has not offered a satisfactory explanation for the explicit references to Mr Nutbrown or Robbies in the documents relied on by the Secretary and, in



light of the arrangements described in the documents, the Commission cannot be satisfied as to Mr Nutbrown's suitability.

- (c) There is no plausible basis to suggest that Mr McIntyre lied to Mr O'Brien about the promises that were made to Mr Nutbrown, because the email dated 12 November 2012 indicates that Mr O'Brien took on Robbies as a favour to Mr McIntyre, rather than the other way around. Accordingly, there would have been no motivation for Mr McIntyre to make the transfer of the Robbies to BHL appear to Mr O'Brien to be more difficult than it actually was.
- (d) The Commission should give weight to its previous findings in earlier appeals in relation to the documents relied on by the Secretary. In previous decisions the Commission found that the same documents suggested the involvement of the venue operator of Robbies in behaviour prohibited by the Act.
- (e) Mr Nutbrown's willingness to allow people who are not declared as key persons of Robbies (namely, Mr McIntyre and Mr Kofoed) to make crucial decisions as to the operation of gambling at his venue is a matter of concern in terms of the Secretary's ability to monitor properly the suitability of those in the gambling sector. This is a factor likely to detract from achieving a purpose of the Act; namely limiting the opportunities for crime or dishonesty associated with gambling.

Analysis

22. The Commission identified the following issues as arising for determination:

- (a) What is the correct test for assessing key person suitability?
- (b) Applying that test, is the Commission satisfied of Mr Nutbrown's suitability, in terms of section 68 of the Act (per section 67(1)(c) and (d))?
- (c) Is the Commission satisfied that there are no other factors that are likely to detract from achieving the purpose of the Act (per section 67(1)(r))?

The correct test for assessing key person suitability

23. The Commission has considered the key person suitability test in previous decisions and is not persuaded to depart from its prior considered approach. The express test is whether it is satisfied that the material before it, which relates to Mr Nutbrown's profile of past compliance, does not cause it not to be satisfied about the suitability of Mr Nutbrown. The test does not depend on there being a breach established to a requisite standard. Similarly, establishing a breach, to any particular standard, would not necessarily be conclusive. The Commission's satisfaction is likely to balance a number of matters, including the strength of any evidence of non-compliance (including ease of detection and the likelihood of evidence of certain breaches being available), the seriousness of the apparent non-compliance and

the risk of repetition in the future. The Secretary must have some evidence of compliance issues in order for it to be an issue, and not all evidence put forward by the Secretary will necessarily give rise to doubt on the part of the Commission. But once the doubt is raised, the onus falls on the applicant to leave the Commission satisfied (to adopt a shorthand for the statutory double negative set out above).

24. In substance, the Appellant argued that the factual starting point of the Commission's approach to suitability should be identical to the requirements for establishing the breach ground for the imposition of the punitive sanctions under the Act. However, it is apparent that the Act creates three different standards of proof depending on context. To prosecute a party for an offence, the Secretary must establish the elements of the offence beyond reasonable doubt. In order to impose a punitive sanction (cancellation or suspension) under section 74(1)(b), the Secretary must establish the relevant non-compliance on the balance of probabilities. In deciding whether a licence application must be refused for failure of the requisite satisfaction under section 67, the Secretary is required to decide whether the material uncovered by his investigation leaves him satisfied or not satisfied.
25. As the Commission noted in *Phoenix*, there is no starting presumption of satisfaction to be displaced. Because the decision-maker must be satisfied of each of the grounds in section 67(1), any aspect that could result in dissatisfaction is something for the applicant to deal with in such a way that satisfaction is achieved. If there are doubts, they are to be resolved by refusing the application. In *Bluegrass Holdings Limited* (decision GC10/14), the Commission noted that the suitability standard distinguishes this ground from other grounds for cancellation in the Act. In particular, the issue of suitability does not involve a balance of probabilities analysis.
26. *First Sovereign Trust Limited* (decision GC17/14) does not represent a departure from this approach. The Commission did not, in that decision, apply the balance of probabilities standard. It simply found that it did not have to form a final view on whether or not the Secretary's allegation of past non-compliance was made out, as it found that, even assuming the allegation to be correct, the allegation did not so negatively affect the key person's profile of past compliance as to cause the Commission not to be satisfied of his suitability. This does not suggest that the Commission was applying a lower standard than positive satisfaction, but rather that the Commission considered that the Secretary's allegation was immaterial to its assessment of the key person's suitability.
27. The Commission finds little support for the Appellant's proposed test in Z. The test in the Dental Act required the Dental Complaints Assessment Committee to be "satisfied" of a practitioner's guilt. Such a test requires a positive finding of guilt on the balance of probabilities. As noted above, the satisfaction requirements of section 67(1)(c) and (d) are to the opposite effect and mean that lack of satisfaction about the key person's suitability in the context of these subsections must result in the refusal of the licence.

28. Contrary to the Appellant's submission, this approach does not mean that a weakly indicated allegation by the Secretary will be accepted as correct. The Commission will assess the strength of the Secretary's evidence in support of an allegation. A weakly supported allegation is unlikely to be given much weight by the Commission in its assessment of the person's profile of past compliance or overall suitability. The test does not require proof by the applicant that no breach or past non-compliance occurred and it is not the case that, failing that, an applicant cannot contest suitability. Not only is the occurrence of a past breach not conclusive (as demonstrated by the *First Sovereign* decision) but the strength or otherwise of the evidence about compliance is bound to have an impact on overall satisfaction.
29. To summarise, there is no requirement of a "proper evidential basis" establishing a past non-compliance before information relating to past compliance can be considered as part of the person's profile of past compliance. Nor is it required that the Secretary establish an allegation of non-compliance on the balance of probabilities. The question is whether the information before the Commission leaves it satisfied or not about the key person's suitability. In this appeal, the Secretary has put forward evidence of non-compliance. The evidence indicating past non-compliance must be considered by the Commission. The Commission must also consider what the Appellant says about the relevant profile of past compliance and decide whether the suitability criteria are met.
- The Secretary's case regarding Mr Nutbrown's suitability*
30. The Secretary relied on Mr Gurr's note and the "unusual" pattern of grants to certain Belfast community groups to support his conclusion that Mr Nutbrown has been involved in behaviour prohibited by section 113. The Secretary also suggested that certain of Mr Nutbrown's answers in his interview indicated an awareness of where the funds generated by his venue were allocated.
31. Mr Gurr's note and accompanying schedule setting out BHL's budget indicate that proceeds generated by particular venues were ear-marked for causes that Mr Nutbrown has an interest in. The note contains explicit reference to Robbies, linking the venue to Belfast Rugby Club (a society of which Mr Nutbrown is a life member) and suggesting that BHL can only "retain" Robbies as a venue if it "support[s] their requests". The pattern of grants to the particular causes mentioned in Mr Gurr's note is consistent with the arrangement that the note describes. During the period in which Robbies was licensed to a particular society, donations by that society to the specified causes would increase dramatically, and then cease altogether once the venue licence was no longer held. The pattern supports an implication that those grants were made under pressure from the venue.
32. Counsel for the Secretary noted, in her closing submissions, that in *Bluegrass Holdings Limited* (decision GC10/14), the Commission made findings that Mr Gurr's note indicated that BHL, through Mr Gurr, was open to influence by venue operators about grant allocations



and that the note "clearly links grant recipients to identified venue operator requests" (at [65]).

33. The Secretary's case that Mr Nutbrown had been involved in behaviour in breach of section 118 focussed on the fact that Mr Nutbrown decided to move his venue to BHL, even after BHL's operator's licence had been cancelled (and remained in effect solely as a result of an appeal) despite the risks to Robbies posed by the cancellation of BHL's operator licence, because of a recorded promise that he would be reimbursed for site rental, in cash, if BHL ceased operating.
34. The Secretary relied on the email correspondence between Mr O'Brien and Mr McIntyre. The earlier emails of 18 July 2012 show that Mr O'Brien told Mr McIntyre that he could promise Mr Nutbrown the lost site rental in cash if BHL's licence was cancelled. The promise of site rental was referred to again in the later email of 12 November 2012, suggesting that Mr Nutbrown was told about the promise and that the promise was the reason that Robbies proceeded with the move to BHL.
35. To support his allegation of a section 118 breach, the Secretary also relied on Mr Nutbrown's contradictory answers during his interview regarding the decision to move to BHL. Initially, when he was asked if he was aware of any process in place for the Department to cancel BHL's licence, Mr Nutbrown responded "No, definitely not, no." After being shown a copy of the email from Mr McIntyre to Mr O'Brien on 18 July 2012, Mr Nutbrown changed his position saying:

Oh yeah well that's basically true but I wouldn't say it was that, I wouldn't say that it was accurate because I did get, I did get, but its probably...but I did get people from other venues saying that, from other, representatives from other trusts saying that they were being investigated but I didn't sort of really believe it but I did probably say to Ray and I did get, I can't remember who told me about the 60K I said someone, someone told me that they were getting paid so I asked Ray about that, I said oh is that true, not that I expected it or anything.

Mr Nutbrown's evidence

36. Mr Nutbrown consistently denied the Secretary's allegations. He denied any involvement in the allocation of BHL grants, both initially in his interview with the Department and subsequently in his two affidavits. He also consistently denied being aware of Mr Gurr's note and the arrangements that it records.
37. Under examination before the Commission, Mr Nutbrown denied having made any requests or expressing any particular preferences as to grant recipients and said that he had not had any discussions with Mr McIntyre on the topic. Mr Nutbrown suggested alternative explanations for the pattern of grants identified by the Secretary, which did not require any involvement by him in the allocation process. BHL's policy of allocating funds to Belfast Rugby could have been as a result of a decision to give grants to local clubs where the venue operates. Although Mr Nutbrown did not know whether or not BHL was aware that he

was associated with Belfast Rugby, BHL could well have known about the association because of the display of Belfast Rugby shirts and photographs in his bar.

38. In his affidavit evidence, Mr Nutbrown denied that there was any arrangement or offer for site rental to be paid in cash, or any discussion to that effect. He also denied that he had ever received any site rental in cash. In his second affidavit he stated that his interview answers were not contradictory; he had heard rumours that BHL was being investigated and that some sort of action was being taken against it, but he did not take the rumours seriously.
39. The emails between Mr O'Brien and Mr McIntyre suggest that Mr Nutbrown was nervous about the cancellation and that Mr McIntyre had advised Mr Nutbrown of cash site rental payments. There can be no doubt that Mr McIntyre and Mr O'Brien communicated as they did, because the Commission has direct evidence of the communications themselves. Mr Nutbrown consistently asserted that the suggestion in the emails is untrue: he said that he had never discussed receiving cash payment for missing site rental with Mr McIntyre. In closing submissions, counsel for the Appellant suggested that Mr McIntyre had a motive to mislead Mr O'Brien in his emails as to his influence over venue operators, because Mr McIntyre was in need of money and work.

The Commission's view

40. The evidence relied on by the Secretary to support his allegations that Mr Nutbrown was involved in conduct prohibited by the Act is secondary and indirect. It does not involve any admission by him (as he was not a party to any of the communications) but rather rests on statements made by other parties in contemporaneous documents.
41. Faced with a conflict between what the contemporaneous documents indicated and Mr Nutbrown's denials on oath, the Commission decided to examine him. He was cross-examined by counsel for the Secretary, examined by counsel assisting the Commission and re-examined by counsel for the Appellant.
42. The oral examination of Mr Nutbrown clarified a number of points that were not covered in the Appellant's submissions or the affidavit evidence of Mr Nutbrown. Mr Nutbrown answered the Secretary's questions about the reasons for Robbies moving to BHL. Mr Nutbrown gave evidence that Paul Kofoed, the owner of the Robbies franchise, plays a major role in almost all of the operating decisions of Robbies bars, from advertising to setting the menu. Mr Kofoed also influences and advises the franchise venue owners about the corporate society with which they should align. Mr Nutbrown stated that he did not have any preference between the trusts and that he moved on the recommendation of Mr McIntyre and, principally, Mr Kofoed. Mr Nutbrown's evidence was that Mr Kofoed wanted all of the Robbies franchise holders to eventually be with Phoenix Trust (once it was operational) and that, as Robbies Belfast was a venue with reasonably high turnover, it would move first and the others would follow. It was Mr Nutbrown's understanding that the move to BHL was because BHL would release the venues at short notice to go to Phoenix once it was set up.



43. Mr Nutbrown also addressed the Secretary's suggestion that his answers were contradictory and that he was aware of BHL's cancellation before it applied for the venue licence for Robbles. Mr Nutbrown said that, when he heard rumours of an investigation, he had spoken to Mr McIntyre about it, who advised him that the investigation was nothing to be worried about. Mr Nutbrown admitted that he did not press Mr McIntyre for details about the nature of the investigation nor make any further enquiries about what he had heard. He simply accepted Mr McIntyre's word that nothing would result from the investigation.
44. The Commission formed the view that Mr Nutbrown was an honest and truthful witness. He answered all of the questions put to him in an open and convincing manner. Mr Nutbrown said that he had been naive and that, in hindsight, he should have made further inquiries about the rumours that he had heard about the investigation into BHL, especially given the financial consequences that the cancellation of BHL's operator's licence would have on his venue.
45. Mr Nutbrown's evidence before the Commission was consistent and coherent. The Commission accepted his evidence as a truthful account of his conduct. In doing so, the Commission took into account the point made by the Appellant that it has not had the opportunity to examine the authors of the documents on which the Secretary relies. In contrast, Mr Nutbrown asked to appear before the Commission, provided sworn evidence in person and was subject to cross-examination by the Secretary and examination by the Commission. The Commission accepts Mr Nutbrown's evidence in preference to the implications that the Secretary has drawn from the documents authored by others and is satisfied about his suitability.
46. The Commission does not consider that its findings in *Bluegrass Holding Limited* about Mr Gurr's note and in *Phoenix* regarding the email correspondence determine the present appeal. The Commission's decisions that those documents left it dissatisfied with the suitability of particular key persons did not depend on the objective truth of the documents' entire contents, but on the authorship of the documents in question and the indication of the authors' beliefs and preparedness to act in an unacceptable manner.
47. For those reasons, the Commission is satisfied that the Appellant meets the requirements of section 67(1)(c) and (d).
- Other factors – section 67(1)(r)*
48. The Appellant's submission as to the approach to be taken to section 67(1)(r) was not challenged and the Commission adopts that approach; namely, that the Commission must:
- (a) identify whether there is any particular factor of concern;
 - (b) identify how that factor might detract from a particular purpose of the Act; then



(c) determine whether it is likely that the factor will detract from the purpose of the Act in the future if a licence is granted.

49. The Secretary's case focuses on the apparent influence of Mr McIntyre on Mr Nutbrown's past decisions to enter into venue agreements with different societies associated with Mr McIntyre. The Secretary suggests that the influence of Mr McIntyre detracts from the Act's purpose of limiting the opportunities for crime or dishonesty associated with gambling.

50. On close analysis, part of the Secretary's case on section 67(1)(c) repeats the case on suitability, as it asserts that Mr Nutbrown knew about, and was a willing participant in, the dealings between Mr McIntyre and Mr O'Brien discussed in the emails and referred to in Mr Gurr's note. Those assertions have been considered fully in the previous section.

51. Without the assertion of Mr Nutbrown's complicity in the wrongdoing of Mr McIntyre and Mr O'Brien, the Secretary's case in relation to section 67(1)(r) loses much of its force:

(a) The "influence" of Mr McIntyre seems to be no more than success in marketing his services to Mr Nutbrown and Mr Kofoed. That sort of influence at a venue is likely to exist in the case of all incumbent societies. Such influence is quite different in character to the sort of influence that the Commission found that Mr McIntyre appeared to have over Phoenix Trust and Sideline Bar (in GC04/14) or Mr O'Brien over BHL (in GC10/14).

(b) Although it appears that Mr Nutbrown (and Mr Kofoed) were sufficiently impressed with Mr McIntyre's services in the past, which had an effect on their decisions about which corporate society should operate gaming machines at Robbies, there seems to be no reason, in the light of more recent events, to think that Mr McIntyre would have any influence over Mr Nutbrown in the future. Counsel for the Secretary did not put such a proposition to Mr Nutbrown. As the Appellant submitted, there is no suggestion that Mr McIntyre influenced the decision to enter into a venue agreement with the Appellant. The present circumstances contrast strongly with those which created a lack of confidence on the part of the Commission about continuing covert influence in the other appeals referred to.

52. The Commission is satisfied that the requirements of section 67(1)(r) are met.

Remaining issues

Can the Commission rely on the First Sovereign Trust Limited decision?

53. The Secretary submitted that the Appellant should not be able to refer to the *First Sovereign Trust Limited* decision, a recent Commission decision which has not been publically released as the result of controversy about the extent of detail which is permitted to be published. In reply, the Appellant submitted that the decision is relevant to the issues in this appeal and

that it is not unusual for decisions which are subject to publication restrictions to be made available to counsel in other proceedings, with appropriate restrictions.

54. In the Commission's view it was proper for counsel to refer to *First Sovereign* in submissions. The Commission has proper concern in its decisions being consistent and has made reference to *First Sovereign* accordingly. The Commission has taken care to ensure that it has not referred to any aspects of the decision that are the subject of non-publication orders or that are controversial.

Backdating the licence if appeal allowed

55. In its original submissions, the Appellant argued that the appeal be expedited in order to ensure that Robbies does not become unlicensed for a period of six months. The concern for the Appellant is that, if Robbies is unlicensed for six months or more, it will no longer fall within section 92 of the Act, which provides that "pre-October 2001" venues can operate up to 18 machines as long as they are not unlicensed for a period of six months or more. There is also a risk that Robbies would no longer be able to conduct gambling at all as, under section 98(c) of the Act, if a corporate society applies for a class 4 venue licence and a class 4 venue licence has not been held by any society for the venue within the last six months, a territorial authority consent would be required. In the light of Christchurch City Council's 'sinking lid' policy, it is unlikely that a territorial consent would be granted.
56. The Commission held in *Air Rescue Services Limited* (decision GC26/10) that both the Secretary, and the Commission on appeal, have the power to backdate the effective commencement of a licence in order to preserve continuity for the purposes of section 92, in appropriate cases. An obvious situation where backdating would be appropriate, the Commission held, would be in the case of a successful appeal.
57. Following the filing of the parties' submissions, the Commission sought submissions from both parties addressing the issue of backdating the Appellant's licence, in the event that the Commission allows the appeal.
58. In their memoranda, the parties agreed that the Commission may backdate a licence to preserve the status of a venue under section 92, in appropriate cases. Because the expiry of the six month period for Robbies was largely due to factors that were outside the control of the Appellant and the venue operator, the parties agreed that, if the Commission allowed the Appellant's appeal, it would be open to the Commission to backdate the commencement date of the licence and that it should do so. The Commission considers that this is an appropriate case for backdating the commencement date of the licence.
59. The only question then is the appropriate backdated date. The Secretary submitted that the licence for Robbies has not been held since 12 September 2014 and that the appropriate start date for the licence would be that immediately prior to the expiry of the six month period, that is, 11 March 2015. The Appellant submitted that the appropriate start date for

the licence is 17 February 2015, being the day before the date six months from cancellation of BHL's operator licence on 18 August 2014. The Appellant submitted that this date avoids any potential difficulties or complications arising as a result of BHL having subsequently obtained relief from the High Court.

60. The difference between the parties turns on the confidence that they have in the view that BHL's operator's licence continued to be in force, by virtue of interim relief granted by the High Court, until the 12 September 2014 when the Secretary received Faire J's minute discontinuing the judicial review proceedings. In the Commission's view, there is no compelling reason not to accede to the Appellant's request to backdate to 17 February 2015 to avoid any risk.

Decision

61. For the reasons already provided, the Commission reverses the decision of the Secretary to refuse to grant a new class 4 venue licence to the Appellant for Robbins. It directs the Secretary to issue a venue licence with a commencement date of 17 February 2015 permitting the use of up to 18 machines.



Graeme Reeves
Chief Gambling Commissioner
for and on behalf of the Gambling Commission

